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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 243.

MARYLAND AND VIRGINIA MILK PRODUCERS' ASSOCIATION, INCORPORATED, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

BRIEF OF THE NATIONAL COOPERATIVE MILK PRODUCERS' FEDERATION AS AMICUS CURIAE.

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July 17, 1941.

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v.

DISTRICT OF COLUMBIA, *Respondent.*

BRIEF OF THE NATIONAL COOPERATIVE MILK PRODUCERS' FEDERATION AS AMICUS CURIAE.

FOREWORD.

The National Cooperative Milk Producers' Federation, hereinafter referred to as the Federation, by its counsel, respectfully submits herewith its brief as *amicus curiae,* in the within cause, having first secured permission of the Petitioner and Respondent in this case.

STATEMENT OF INTEREST.

The Federation is a non-stock, non-profit corporation, organized and existing under the laws of the State of Illinois and is composed of fifty-nine farmer-owned and farmer-controlled cooperative dairy associations which are engaged either in marketing, or manufacturing and marketing, the milk and other dairy products of their farmer-

members throughout the continental United States and in several foreign markets. These member associations of the Federation are bona fide farmer cooperatives incorporated under the cooperative enabling statutes of the several States and conform to the specifications of the Capper-Volstead Act, 42 Stat. 388, 7 U. S. C. 291, 292. They are organized for the mutual benefit of their members who are either farmers producing milk or cooperative creameries in turn owned and controlled by farmers producing milk. They are located in forty-one States of the Union and the majority of them, in respect to marketing the milk production of their members, are engaged in interstate commerce including the District of Columbia.

The within proceedings involves the character of organization and method of operation of one of such member associations, viz., the Maryland and Virginia Milk Producers' Association, Inc., the Petitioner in this cause. The decision of the Court below, as we believe, brings into question the fundamental concept of agricultural cooperation, namely, the non-profit motive of cooperative enterprise and, if permitted to stand, bids fair to destroy this way of agricultural self-help which through the years has found mutual encouragement in the enactments of Congress and the legislatures of the States as well as in the interpretations placed upon them by the courts.

The decision of the Court below is a challenge to cooperation and it is in the interest of the member associations of the Federation whose character of organization and method of operation parallels those of the petitioner-association herein and who, under facts similar to those in the case at bar, may be confronted with the adverse ruling of the United States Court of Appeals for the District of Columbia, that this brief *amicus curiae* is submitted in aid of this Court's determination respecting its jurisdiction in this case.

In so doing, counsel for *amicus curiae* is not unmindful of the fact that he will be confronted with the contention

that each case must turn necessarily on its own peculiar facts and circumstances and that the precedent of the decision below may be unavailing in another jurisdiction but, as he has advised *amicus curiae*, the opinion of the Court below as to the character and method of operation of petitioner-association is contrary to the great weight of authority, federal and state, and that as to the application of the taxing statutes involved is contrary to the prior decisions of this Court and repugnant to the Fifth Amendment and the Commerce Clause of the Federal Constitution.

QUESTION OF GENERAL IMPORTANCE PRESENTED.

Since this decision, as we believe, casts into doubt the legal status of agricultural cooperative associations and is contrary to the judicial precedents of this and other forums as well as to the concept of agricultural cooperation as expressed in federal and state statutes, we respectfully submit, that it presents a question of general importance and the Petition for Writ of Certiorari should be granted.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia was entered on April 21, 1941. (R. 168.) The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. Section 347), and Section 975 (a), Title 20, Supp. V., Code of the District of Columbia, 1929 (52 Stat. 371, C. 223, Section 8).

OPINION BELOW.

The opinion of the Court below and the opinion of the Board of Tax Appeals for the District of Columbia from which the appeal was taken in the first instance are as recited in the Petition for Writ of Certiorari. (p. 3.)

FACTS.

The facts, counsel for *amicus curiae* believes, are as set forth in the Petition for Writ of Certiorari, as are the questions presented here for review. (p. 3 to 11.)

SPECIFICATION OF ERRORS.

Those errors which we believe inhere in the decision of the Court below, to which *amicus curiae* addresses itself in its brief and at the risk of being repetitious, are as follows: We believe the Court erred—

1. In failing to hold that petitioner-association was the agent of its farmer-members in respect to the marketing of their milk and the collection and disbursement of the proceeds arising from the sale thereof.

2. In holding petitioner-association, as a corporate entity, was engaged in business for gain or economic benefit in the District of Columbia within the purview of the Act of Congress (Title 20, Sections 970 to 970 (15), Supp. III to the Code of the District of Columbia, 1929).

3. In holding that petitioner-association had a commercial domicile and was engaged in business in the District of Columbia within the purview of Section 752, et seq., Title 20, Part V, Code of the District of Columbia, 1929, pertaining to the taxation of personal property in the District of Columbia.

4. In holding that the revolving fund representing excess brokerage deducted from the net proceeds of the sale of its farmer-members' milk not depleted ad interim for the lawful and authorized expenditures of the association, including the establishment of reserves, was the property of petitioner-association rather than the property of its farmer-members held in the custody of the petitioner-association under fiduciary obligation.

5. In holding that accounts receivable from dealers representing uncollected proceeds for the sale of its farmer-

members' milk and collectible by the association was the property of the petitioner-association and not its farmer-members.

6. In holding said revolving fund and accounts receivable from dealers subject to taxation by the government of the District of Columbia under the authority of the Act of Congress (Title 20, Part V, Sections 752, et seq., Code of the District of Columbia, 1929).

7. In holding that the measure of tax amenability of petitioner-association under the Act of Congress (Title 20, Sections 970 to 970 (15), Supp. III to the Code of the District of Columbia, 1929) was the gross receipts derived from the sale of all of its farmer-members' milk.

ARGUMENT.

I.

A. Petitioner-Association is a Non-Stock, Non-Profit, Farmer-Owned and Farmer-Controlled Cooperative Dairy Marketing Association, Organized and Existing Under the Cooperative Associations Enabling Act of the State of Maryland, Domesticated Under the Similar Statute of the State of Virginia, and Engaged in Marketing the Milk of Its Farmer-Members, All Non-Residents of the District of Columbia, and as Such is Distinguishable from a Proprietary Corporation and is, in Fact, the Antithesis of the Commercial Corporate System.

Seemingly in conflict with the concept of agricultural cooperation as expressed in various acts of Congress[1] and

[1] *Capper-Volstead Act*, 42 Stat. 388, 7 U. S. C. 291, 292; Section 6, *Clayton Act*, 38 Stat. 731, 15 U. S. C. 17; *Cooperative Marketing Act*, 44 Stat. 802, 7 U. S. C. 451 *et seq.*; *Agricultural Marketing Act of 1929*, 46 Stat. 11, 12 U. S. C. Sec. 1141; *Amendments to Agricultural Marketing Act of 1929*, 49 Stat. 316, 12 U. S. C. 1141e, 1141j; *Bituminous Coal Act of 1937*, 50 Stat. 72, 15 U. S. C. 828 *et seq.*, particularly Section 833 (i) 13; *Robinson-Patman Act*, 49

contrary to the prior decisions of this Court, the overwhelming weight of authority, federal and state, and the cooperative association enabling statutes of the States of Maryland and Virginia, the United States Court of Appeals for the District of Columbia holds petitioner-association to be a proprietary corporation and owner of the proceeds arising from the sale of its farmer-members' milk, rather than their agent or other fiduciary in respect to the marketing of their milk and the collection, investment and distribution of the proceeds of the sales thereof. (R. 162.)

In consequence of this holding, the Court sustained the tax assessment of petitioner-association as owner of certain accounts receivable and revolving fund representing proceeds from the sale of its farmer-members' milk. (R. 160-164.)

1. The fundamental difference between capitalistic and cooperative enterprise is one which has been commonly accepted by legislatures and courts alike.

The importance of a well recognized fundamental distinction between a cooperative association and the ordinary proprietary corporation[2] may not be minimized in the in-

Stat. 1526, 15 U. S. C., Supp. IV, 13-13b, 21a; *Internal Revenue Code*, Sections 101 (12) and (13), 43 Stat. 253-355, 52 Stat. 480, 26 U. S. C. 101; *Grain Futures Act*, 42 Stat. 998, and *Commodity Exchange Act*, 42 Stat. 1000, 7 U. S. C. 7-10a; *Packers and Stockyards Act*, 42 Stat. 164, 7 U. S. C. Sec. 207; *Farm Credit Act*, 48 Stat. 257, 12 U. S. C. 1134.

[2] "The basic legal and economic principles of the cooperative scheme are limitation upon the voting power and restrictions upon alienation of voting stock or membership interests, thus preserving the dispersion of control and keeping the control within the class affected; limiting the use of proxies, thus fixing the responsibility upon the cooperators; the limitation of earnings upon invested capital, thus insuring the non-profit character of the scheme; and the distribution of earnings or savings upon a patronage basis, that is, according to the quantity or value of the products marketed through the association by the respective members * * * Ownership and control of the association resides in the member, not on the basis of invested capital, but as one of the rights or incidents of member-

stant case. The vulnerability of the opinion of the Court below rests in its failure to recognize this distinction. Not only did the Court fail to recognize the distinction, but it held the petitioner-association to be a proprietary corporation which necessarily carried with it certain tax amenabilities. In fact, it held petitioner-association to be that which it is not,—to be that of which it is the antithesis.

The record is clear that petitioner-association is a cooperative marketing association. (R. 1, 2, 24-43, 86.)

In holding petitioner-association to be a proprietary corporation and owner of these funds, the Court below ignored completely the prior decisions of this Court which recognize the fundamental differences alluded to *supra* between a non-profit cooperative association and the ordinary corporate concern organized and operated for profit.

That such a distinction exists was recognized by this Court in *Frost* v. *Corporation Commission*, 278 U. S. 515, 523, 73 L. ed. 483, 49 S. Ct. 235. The distinction is alluded to again in *United States* v. *Rock Royal Cooperative, Inc. et al.*, 307 U. S. 533, 563, 83 L. ed. 1446, 59 S. Ct. 993. *Vide*, also:

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ship, each member having limited voting rights. The voting control thus decentralized permits, however, through the agency of the association, a centralized economic control of the product * * * customarily accomplished by use of the Marketing Contract which provides for the marketing of the products of the members exclusively through the Association.

"* * *

"* * * The association does not engage in the operation common to the profit enterprise, namely, to buy low and sell high. * * * There is no 'profit' as such to the legal entity—the association. There are no dividends in the ordinary sense, but merely remittances to members on a pro-rated basis of any accumulated funds on hand in excess of operating costs and necessary or legally required reserves.

"* * * The association, ordinarily, acts essentially as an agent of its members in ascertaining or developing markets, and in the selling and distributing of the products. The marketing transaction is not complete until the proportion due each member from the proceeds of sales has been remitted. In the true sense, there is no 'profit' involved." *The Law of Cooperative Marketing*, Evans and Stokdyk, The Lawyers Cooperative Publishing Company, Rochester, New York, 1937, pp. 3 to 5, inclusive, 30 to 32.

Dissenting opinion of Mr. Justice Brandeis, concurred in by Mr. Justice Holmes and Mr. Justice Stone, in *Frost* v. *Corporation Commission*, 278 U. S. 515, 536, 73 L. ed. 483, 49 S. Ct. 235; *Board of Trade* v. *Olsen*, 262 U. S. 1, 40, 67 L. ed. 839, 43 S. Ct. 470, sustaining the Grain Futures Act, 42 Stat. 998, 7 U. S. C. 1-17; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 173, 55 L. ed. 389, 31 S. Ct. 342, and *Brushaber* v. *Union Pacific Railroad Company*, 240 U. S. 1, 21, 60 L. ed. 493, 36 S. Ct. 236, sustaining the income tax exemption of cooperative associations under federal revenue measures.

The Court below ignored further the many statutes, federal and state, which similarly recognize this distinction and wherein, unlike the ordinary commercial corporation, cooperative associations, their activities and contracts, are afforded peculiar protection. One of such statutes has received the favorable consideration of this Court. *Liberty Warehouse Company* v. *Burley Tobacco Growers' Co-operative Marketing Association*, 276 U. S. 71, 72 L. ed. 473, 48 S. Ct. 291.

It is respectfully submitted, therefore, that in failing to draw this distinction between petitioner-association and the ordinary corporate enterprise, the Court below has decided a question contrary to law and adverse to the legal, social and economic interests of cooperative as distinguished from capitalistic enterprise.[3] In holding as it does, the Court has

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[3] See cases *infra* this brief, p. 13. See also: *Potter* v. *Dark Tobacco Growers Co-op Assn.*, 201 Ky. 441, 257 S. W. 33; *Northern Wisconsin Co-operative Tobacco Pool* v. *Bekkedal*, 182 Wis. 571, 197 N. W. 936; *Arkansas Cotton Growers Co-op Assn.* v. *Brown*, 168 Ark. 504, 270 S. W. 946; *Manchester Dairy System* v. *Hayward*, 82 N. H. 193, 132 A. 12; *Burley Tobacco Growers Co-op Assn.* v. *Rogers*, 88 Ind. App. 469, 150 N. E. 384; *Barns* v. *Dairymen's League Co-op Assn.*, 220 App. Div. 624, 222 N. Y. Supp. 294; *Dark Tobacco Growers Co-op Assn.* v. *Dunn*, 150 Tenn. 614, 266 S. W. 308; *Warren* v. *Alabama Farm Bureau Cotton Assn.*, 213 Ala. 61, 104 So. 264; *Lee* v. *Clearwater Growers Assn.*, 93 Fla. 214, 111 So. 722; *Local Dairymen's Co-operative Assn.* v. *Potvin*, 54 R. I. 430, 173 A. 535; *Johnson* v. *Staple Cotton Co-op. Ass'n.*, 142 Miss. 312, 107 So. 2; *Lennox et al.* v. *Texas Cotton Co-op. Assn.*, 55 S. W. (2nd) 549, reversing *Texas Cotton Co-op. Assn.*

decided a question which threatens the continued existence of a form of social and economic control recognized by Mr. Justice Brandeis in his dissenting opinion to the majority of this Court in *Louis K. Liggett Co. v. Lee*, 288 U. S. 517, 579, 77 L. ed. 929, 53 S. Ct. 481, 85 A. L. R. 699, as a "way * * * which leads directly to the freedom and the equality of opportunity which the Fourteenth Amendment aims to secure."

B. Petitioner-Association is the Agent or Other Fiduciary of Its Farmer-Members and, Therefore, the Revolving Fund Represented by Investments in Intangibles Carried in Its Name, and Accounts Receivable from Milk Dealers, Collectible by it, Each Arising Out of the Sale of Milk Produced by and Marketed for Its Farmer-Members, Belong, Not to the Association, but to the Farmer-Members.

Under the decision of the United States Court of Appeals for the District of Columbia, accounts receivable representing the purchase price of milk sold to milk dealers and owing by them were held properly assessed as the property of the petitioner-association. In like manner, the decision of the Court upholds the assessment of the revolving fund, comprised of stocks, bonds, bank deposits, etc., into which the unexpended brokerage deducted from the proceeds from the sale of the farmer-members' milk was converted, as the property of petitioner-association. (R. 160-164.)

In so holding, the Court has decided a question of law contrary to the prior decisions of this Court, the great

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v. *Lennox*, 37 S. W. (2nd) 331; *Tobacco Growers' Co-op. Ass'n.* v. *Jones*, 185 N. C. 265, 117 S. E. 174, 33 A. L. R. 231; *Nebraska Wheat Growers' Assn.* v. *Norquest*, 113 Nebr. 711, 204 N. W. 798; *Minnesota Wheat Growers Coop. Marketing Asso.* v. *Huggins*, 162 Minn. 471, 203 N. W. 420; *List* v. *Burley Tobacco Growers Co-op.*, 114 Ohio St. 361, 151 N. E. 491; *Clear Lake Co-op. Livestock Asso.* v. *Weir*, 200 Iowa 1293, 206 N. W. 297; *Oregon Growers Co-op. Ass'n.* v. *Lentz*, 107 Ore. 561, 212 P. 811; *Stark County Milk Producers Asso.* v. *Tabeling, etc.*, 129 Ohio St. 159, 194 N. E. 16; *Washington Cranberry Asso.* v. *Moore*, 117 Wash. 430, 201 P. 773.

weight of authority, federal and state, and the statutes of the States of Maryland and Virginia, under which petitioner-association is incorporated in the one instance, and domesticated, in the other.

That the terms of the marketing contract, read by itself, or in conjunction with the by-laws of petitioner-association and the cooperative laws of the States of Maryland and Virginia, belie the conclusion that ownership of the accounts receivable and revolving fund is in the petitioner-association may not be gainsaid under the prior decisions of this Court. The Court's decision, in this regard, is in seeming direct conflict with the decision of this Court in *Sturm* v. *Boker*, 150 U. S. 312, 326, 37 L. ed. 1107, 14 S. Ct. 99, cited in the dissenting opinion of Chief Justice Groner. (R. 167.)

There as here, the letters in that instance, the contract in this, were couched in terms of consignment and not terms of sale.

Going beyond the consignment stipulations in the marketing contract, it is absolutely devoid of any language importing a passage of title to the milk or cream to the petitioner-association. (R. 20-29, 86.)

Petitioner-association's by-laws in no wise portend a purchase and sale arrangement as between it and its farmer-members. (R. 30-43, 86.)

The appropriate provision of the Maryland statute under which petitioner-association is incorporated, viz., Section 441, Article 23, Flack's Annotated Code of Maryland, 1929, Volume 1, provides: "Any association, organized under this Act, as agent to sell the products of members may operate upon a non-profit basis by contracting to pay the members, for products sold by said members to or through the association, the resale price minus uniform charge to cover the expenses in the handling of said products * * *". (R. 123.) (Appendix "B", Petitioner's Supporting Brief, p. 38.)

Thus, when the marketing contract in the instant case on its face imports a consignment relationship between the petitioner-association and its farmer-members, and when

that is believed to be the unmistakable intention of the parties in the light of petitioner-association's by-laws and the cited provision of the Maryland code under which it is incorporated, it is crystal clear that the pronouncement of this Court in the *Sturm case supra,* applies. The decision of the Court below, on the other hand, is in apparent conflict with and contrary to the decision in the *Sturm case, supra.*

As is pointed out by Chief Justice Groner in his dissent from the majority opinion—"The manner of operation or co-operation is more clearly disclosed in two instruments—petitioner's charter and the contract of membership. In neither is there any mention of title passing to petitioner * * * The agreement clearly points to the relation of factor or agent * * *" (R. 166.)

We submit, whatever be the correct description of the fiduciary relationship existing between petitioner-association and its farmer-members, the holding of the United States Court of Appeals for the District of Columbia is not only contrary to the decision of this Court in the *Sturm case, supra,* but to the great weight of authority, federal and state.

As to the relationship created by the marketing contract it is in apparent conflict with the decisions of the Fifth Circuit Court of Appeals in *Edwards Shoe Factory* v. *Stewart,* 107 Fed. (2nd) 123, 126; *Philips* v. *United States,* 59 Fed. (2nd) 881, decided by the United States Court of Appeals for the District of Columbia, Cert. denied, 287 U. S. 639, 77 L. ed. 553, 53 S. Ct. 88; *Vail* v. *Durant,* 7 Allan 408, 83 Am. Dec. 695 (Mass.) *Vide,* also: *Eastern Livestock Corporation* v. *Dickinson,* 107 Fed. (2nd) 116.

1. The great weight of authority, with which the opinion of the Court is in direct conflict, is to the effect that the relation between a cooperative association and its members is that of trustee to beneficiary or principal to agent.

It is generally held that a cooperative marketing contract creates between the association and a member the relation of principal and agent, the association being a sales agency operating for the benefit of its members. 2 *Am. Jur.* p. 27, citing *Phez Co.* v. *Salem Fruit Union*, 103 Ore. 514, 201 P. 222, 205 P. 970, 25 A. L. R. 1090; *Spencer Co-op. Live Stock Shipping Asso.* v. *Schultz*, 209 Wis. 344, 245 N. W. 99.

That the relation between a cooperative association and its members is that of trustee to beneficiary or principal to agent was held in *Mountain States Beet Growers Marketing Association* v. *Monroe*, 84 Colo. 300, 269 P. 886. And in *Rhodes* v. *Little Falls Dairy Co.*, 230 App. Div. 571, 245 N. Y. Supp. 432, the court held that the contract between a member and his cooperative marketing association relative to the marketing of his crops partakes of a trust or fiduciary character.

The Supreme Court of Texas in *Texas Certified Cottonseed Breeders' Ass'n.* v. *Aldridge*, 122 Tex. 464, 61 S. W. (2nd) 79, reversing *Same*, 59 S. W. (2nd) 320, in construing a cooperative marketing contract entered into under the Texas cooperative statute, and wherein were used terms of purchase and sale, nevertheless held the contract to be one of agency. The court noted particularly (p. 83 of 61 S. W. (2nd)):

> "It being the clear intention of the members to create a true co-operative marketing association, under the powers enumerated by law and by the contracts, to perform certain services exclusively for its members, and to hold in the face of this intention that the delivery of the seed to the association was an absolute sale would destroy it as a cooperative marketing association. The members have conferred on this association, as their selling agent, such title to the cottonseed with

plenary powers to handle and dispose of same, but the association handles the proceeds thereof for the benefit of itself and its members * * *"

In *City of Owensboro* v. *Dark Tobacco Growers' Assn.*, 222 Ky. 164, 300 S. W. 350, the cooperative marketing contract involved included a provision authorizing the association to hypothecate the tobacco to be delivered to it by growers, and the Kentucky Court of Appeals held that this provision of the contract and another requiring the association to account to the grower for the full proceeds of his tobacco less costs and expenses, made it convincing that it was the intention of the parties to effect an agency relationship and not one of buyer and seller. As the court pointed out (p. 352 of 300 S. W.) "* * * it was essentially a sales contract of agency made by each grower with an association of his own creation primarily and essentially for his own benefit, and in no event for the benefit of the non-profit-earning association which the several growers had organized."

In *Pyrke, Commissioner of Agriculture and Markets* v. *Brudno et al*, 243 App. Div. 493, 278 N. Y. Supp. 353, affirmed in 269 N. Y. 652, 200 N. E. 42, it was held that a cooperative dairy association which contracted to sell milk to a dealer to whom each producer of the association made delivery, was a mere agent, notwithstanding the fact that the dealer was to pay the association and that payments were to be mingled with funds belonging to other members and certain deductions were to be made before distribution. *Vide*, also: *Haarparinne* v. *Butter Hill Fruit Growers' Ass'n.*, 122 Me. 138, 119 A. 116; *Brown* v. *Georgia Cotton Growers' Co-op. Association*, 164 Ga. 712, 139 S. E. 417; *California Bean Growers' Association* v. *Williams*, 82 Cal. App. 434, 255 P. 751; *California Raisin Growers' Association* v. *Abbott*, 160 Cal. 601, 117 P. 767; *Colorado-New Mexico Wool Marketing Assn.* v. *Manning, Sheriff*, 96 Colo. 186, 40 P. (2nd) 972; *State* v. *Dairy Distributors, Inc.*, 217 Wis. 167, 258 N. W. 386, 389, 390; *Lake Charles Rice Milling Co.* v. *Pacific Rice*

Growers' Association (C. C. A.), 295 Fed. 246; Notes to reported cases, 33 A. L. R. 247, 253; 47 A. L. R. 936, 946; 77 A. L. R. 405, 412, and 98 A. L. R. 1406, 1413. *Contra: Neith Co-op Dairy Products Ass'n.* v. *National Cheese Producers' Federation*, 217 Wis. 202, 257 N. W. 624; *Texas Farm Bureau Cotton Ass'n.* v. *Stovall*, 113 Tex. 273, 253 S. W. 1101, decided in 1923 and relied upon by the Court of Civil Appeals of Texas in *Texas Certified Cottonseed Breeders' Assn.* v. *Aldridge*, 59 S. W. (2nd) 320 and reversed in, *Same*, 61 S. W. (2nd) 79.

In *Emigh* v. *Earling*, 134 Wis. 565, 115 N. W. 128, 27 L. R. A. (N. S.) 243, it was held by the Wisconsin Supreme Court that the legal title to the milk, to the products thereof, and to the proceeds arising from the sale thereof, under a contract similar in respects to the one involved in the case at bar, but not involving a cooperative association and its members, was at all times in the patrons of the company, and the moneys arising from a sale of the cheese were held by the company in a fiduciary capacity for the beneficial use of the patrons of the company, and the trust character of the fund was not changed by the fact that it was deposited in the bank to the personal account of the company. *Cf. Lambert* v. *Military Ridge Cheese Co.*, 179 Wis. 359, 191 N. W. 555.

2. The decision of the Supreme Court of New York, Appellate Division, in People v. *Shoemaker, 228 App. Div. 314, 239 N. Y. Supp. 71, 178 N. E. 869, relied upon by the Court below for the proposition that when a cooperative association's contracts with its milk-producing members have been phrased clearly in terms of agency, it has been conceded that title to the milk passed to the association and that the association is the actual seller of the milk, is not in point.*

The Court below relies to great extent upon the *Shoemaker* case, *supra*, to support its conclusion that the petitioner-association, and not its farmer-members, is the owner

of either the milk or the proceeds arising from its sale, thus making it amenable to taxation of such proceeds.

It is respectfully submitted that the *Shoemaker* case, *supra*, has been misapplied by the Court. That case involved the proposition of whether a milk dealer should be licensed as required by law under circumstances where he bought his total supply of milk from a cooperative association, viz., the Dairymen's League Co-operative Association, organized under the Membership Corporations Law of New York and continuing as such by virtue of the Co-operative Corporations Law. The question presented was whether the defendant dealer was buying milk and cream from producers so as to subject him to the license and bonding provisions of the New York Agriculture and Markets law. The case turned on facts substantially as follows: The association received milk and cream from many producers, commingled it and delivered same to the defendant dealer. The League received payment for the milk and cream thus delivered and in turn commingled it with other funds, from which deductions were made before it was pro-rated among all who delivered milk to the association. While the court conceded that the League's contracts with its producers were of the nature of an agency contract, yet it called attention to a provision of the Co-operative Corporations Law under which the association existed directing that "all contracts, made by the corporation with third parties, for the sale or other disposition of products which the corporation had contracted with members or non-members to market for them, shall in all respects be deemed to be the obligations of the corporation within the meaning of this section, whether made by the corporation as principal or as agent for such members or non-members." It pointed out that the contract between the League and the defendant dealer was "a direct contract for the sale of milk" by it; that the League was not in and of itself a producer. In addition, counsel admitted that title to the milk passed to the association. The Court concluded that in view of the character of the League, its method of doing business, and the pro-

vision of the statute alluded to, that the defendant dealer was not buying milk or cream from producers and was, therefore, not subject to the licensing provisions of the Agriculture and Markets law.

Thus, the case turned, not on the relationship of the co-operative association there involved to its farmer-members, under the marketing contract existing between them, but on the particular method of doing business and the technical language of a statute making the association's contracts with third parties, the association's obligation. Here no similar statute is involved.

It is submitted that the Court below should more properly have applied the decision of the same New York Court in *Pyrke, etc.* v. *Bruduo, supra*, than the decision in the *Shoemaker* case, *supra*, for the reason that in the *Brudno* case, the Court directly passed upon the marketing contract between the same Dairymen's League Co-operative Association and its farmer-members and held such contract to be one of agency and not of purchase and sale and distinguished the case, justifiably, we submit, from the *Shoemaker* case on the facts involved.

3. The fact that petitioner-association, in the marketing contract between it and its farmer-members guarantees its farmer-members against loss in the disposal of their milk in no wise changes the relationship of consignment to sale.

In reaching its decision, the Court below placed considerable emphasis on the fact that under the marketing contract, the petitioner-association guarantees payment to its farmer-members for their milk consigned to and agreed to be disposed of by petitioner-association. (R. 161.)

To hold this contract stipulation inconsistent with the creation of the relationship of principal and agent or consignor and consignee and as an important factor in construing the marketing contract as a sales contract, is contrary, we submit, to the decision of this Court in *Ludvigh,*

Trustee in Bankruptcy of Horowitz v. *American Woolen Company of New York*, 231 U. S. 522, 58 L. ed. 345, 34 S. Ct. 161. *Vide*, also: *In re Renfro-Wadenstein et al.*, (C. C. A.) 53 Fed. (2nd) 834, affirming with modifications, *Same*, 47 Fed. (2nd) 238, 244.

The net effect of the contract stipulation whereby the association guaranteed payment to its farmer-members for their milk delivered pursuant to the marketing contract, was simply to make of petitioner-association a *del credere* agent or factor, 25 *Corpus Juris*, 343; 22 *Am. Jur.*, 309, et seq.

C. Petitioner-Association Neither Carried on a Business for Gain or Economic Benefit, Nor Was it Engaged in Business in the District of Columbia, Within the Intendment of Title 20, Supp. III, Sections 970 to 970(15) Inclusive, and Sections 752, et seq., Code of the District of Columbia, 1929, so as to Render it Liable for Taxation in the Manner Adjudged by the Court Below.

1. The Act of Congress imposing a tax on the privilege of carrying on or exercising, for gain or economic benefit, any business in the District does not embrace petitioner-association within the class subject to said tax.

To contend, as the Court below held, that petitioner-association is a corporation or association, carrying on a business for gain or economic benefit within the District of Columbia, does violence not only to the express language of the statute imposing the tax on such activity, but to the purpose and objective of petitioner-association as reflected in Section 419 of the Maryland Code (Appendix "B", Petioner's Supporting Brief, p. 38), made a part of its by-laws (R. 24, 86), its by-laws and the marketing contract between it and its farmer-members.

The character of petitioner-association as a non-stock, non-profit cooperative association, organized for the mutual benefit of its farmer-members within the letter and spirit of the Cooperative Associations law of the State of Mary-

land and the method of its operation each distinguish it from the type of business that it was the intent of Congress to reach in the enactment of the "business privilege tax law" (Title 20, Supp. III, to the Code of the District of Columbia, 1929, Sections 970 to 970 (15), inclusive.)

Certainly it was not so engaged by virtue of the limited transactions wherein it secured milk from others than farmer-members in order to supply distributors' needs (R. 99), for here again no gain or profit inured to the benefit of the corporation. This necessary operation of petitioner-association was but incidental to its main purpose and in aid of that purpose, namely, to market its farmer-members' milk at cost on a cooperative basis. This incidental operation would not have denied it exemption from payment of federal income taxes on corporations under Section 101 (12), Internal Revenue Code, 1939. *Eugenia Fruit Growers Association* v. *Commissioner,* 37 B. T. A. Reports 993.

"There is no 'profit' as such to the legal entity—the association. There are no dividends in the ordinary sense, but merely remittances to members on a pro-rated basis of any accumulated funds on hand in excess of operating costs and necessary or legally required reserves."[4] That quotation from the text cited sums up the fact that while the "profit incentive is the mainspring of commerce, * * * [it] is the antithesis of co-operation." *Tobacco Growers' Co-op. Ass'n.* v. *Jones* 185 N. C. 265, 117 S. E. 174, 182, quoting 23 Col. L. R. 91, 111.

"* * * the association not only was the creature of the growers, but by its charter it had no right to make a profit out of the handling or sale of their products. The whole conception of the organization was that it was a marketing association created and organized for the purpose of advantageous marketing of the growers' product, not for the benefit of the association, but for the benefit of its mem-

[4] *The Law of Cooperative Marketing,* Evans and Stokdyk. The Lawyers Co-operative Publishing Company, Rochester, New York, 1937, p. 31.

bers * * *." *City of Owensboro et al.* v. *Dark Tobacco Growers' Ass'n.*, 222 Ky. 164, 300 S. W. 350, 352, holding agricultural products in the hands of the producer or his agent exempt from taxation and that the contract between association and member was an agency contract.

Petitioner-association under the facts, we submit, fits, in all respects, these concepts of agricultural cooperation, and is not a corporation carrying on a business for gain or economic benefit in the District of Columbia.

The statute here in question does not impose the tax on the privilege of doing business in the District on a business corporation, but rather, a corporation engaged in business for "gain or economic benefit".

In *Connecticut Valley Tobacco Ass'n. Inc.* v. *Inhabitants of Town of Agawam*, 261 Mass. 110, 158 N. E. 506, it was held that while a foreign corporation, organized as a cooperative association without capital stock was subject to an *ad valorem* property tax on tobacco stored in its warehouse within the State of Massachusetts, yet it was not subject to an excise tax, in the nature of a business privilege tax, for the reason that "it has no capital stock, and no corporate excess or net income on which an excise may be laid" under the statute imposing the tax.

And the Supreme Court of Kansas in *Kansas Wheat Growers' Ass'n.* v. *Board of Commissioners of Sedgwick County et al.*, 119 Kan. 877, 241 P. 466, under a tax statute which required a corporation to pay taxes on any property which it owns or holds subject to its control within the state and which is purchased by it with a view of being sold at an advanced price or profit, or which has been consigned to it for the purpose of being sold, held that a non-profit cooperative association was not a merchant within the meaning of the taxing statute and not subject to taxes on account of holding wheat grown by its members.

Unlike the mercantile license tax held applicable to a cooperative purchasing association in *Appeal of Beaver County Co-op. Ass'n.*, 118 Pa. Super. 305, 180 A. 98, where

the practice of buying to sell again and to non-members constituted the association a dealer within the meaning of that term as used in the taxing statute, the "business privilege tax act", is directed to a business operated for gain or economic benefit.

These decisions, it is submitted, while in nowise binding on this Court, give an insight into the construction other courts have placed upon precise definitions in other, and sometimes, similar statutes to the one here involved. At the risk of being too detailed, *amicus curiae*, cites them in support of the contention that petitioner-association, as a corporate entity, does not come within the purview of the "business privilege tax act".

Further, it is difficult to reconcile the decision of the Court below in this regard to the language of this Court in *Frost* v. *Corporation Commission*, *supra*, p. 523, 524, wherein a distinction was made between the types of corporations authorized under two different statutes of the State of Oklahoma. Under one, the corporation became subject to certain state licensing provisions on cotton gins, while a corporation organized under the other, was not so subjected. The distinction there recognized was based upon the non-profit, mutual character of the latter type corporation and this Court was of the opinion that as to such non-profit cooperative association, the apparent discrimination in the licensing law would be valid.

It is submitted that petitioner-association is beyond the pale of the "business privilege tax act" as a corporation engaged in business for gain or economic benefit; that to hold it subject to the tax does violence to the express language of the Act as well as the purpose and objective of petitioner-association's corporate existence as reflected by its by-laws and marketing contract.

a. Under no circumstance was petitioner-association liable to taxation under said Act except for the commissions or brokerage deductible by it under the terms of the marketing contract.

Section 970 (5), Title 20, Supp. III, to the Code of the District of Columbia, 1929, in force at the time, provided: "* * * the tax imposed by this section shall be payable only upon the gross commissions of any person engaged in the business of a broker or agent, and shall not be payable upon the funds of his principal, of which he is a mere conduit."

As Chief Justice Groner pointed out in his dissenting opinion to the majority opinion below (R. 167)—"* * * the gross proceeds of *all milk* sold for members in the year in question is not the basis on which taxes for license purposes may be assessed as 'gross proceeds of operation'. * * * this is obvious from the language of the business privilege tax section in which it is expressly provided that the license tax shall be computed and payable only, in the case of a broker or agent, upon gross commissions and shall not be taxable or payable upon funds of the principal of which the agent is the mere conduit * * *"

If, as we contend, petitioner-association was acting at all times as the agent of its farmer-members in respect to the marketing of their milk and in the collection and disbursement of the proceeds of the sale thereof then, in any event, if assumed to be within the provisions of the Act in question, it is only within the law as it relates to agents and the measure of its tax liability would be its "gross brokerage" and not gross receipts derived from the sale of all of its farmer-members' milk. The holding of the Court below is believed to be contrary to the express provisions of the Act in question providing for the assessment of the business privilege tax, in the case of an agent or broker, on gross commissions.

2. The Act of Congress which imposes a personal property tax only on the moneys and credits, etc., of any association or corporation resident of or engaged in business within the District of Columbia does not embrace the properties taxed as the Court below held.

The Court below held that petitioner-association had established a commercial domicile in the District of Columbia and was engaged in business there. (R. 160.) The petitioner waived any doubt in favor of the taxing authorities of the District and paid the *ad valorem* tax on property having a physical situs in the District, namely, bank deposits, other intangibles and tangible personal property. (R. 6, 7.) Whether it was liable to do so is not in question here.

Since, as we believe and as Chief Justice Groner pointed out in his dissent, petitioner-association at all times acted as agent for its farmer-members, it had no moneys, credits, etc., belonging to it as a corporate entity subject to taxation under said statute (Title 20, Part V, Sections 752, et seq., Code of the District of Columbia, 1929), irrespective of whether it had established a commercial domicile or was engaged in business in the District of Columbia within the meaning of the terms "resident" or "engaged in business" as used in the taxing statute in question.

II.

A. The Fifth Amendment to the Constitution and Clause 3, Section 8 of Article I Inhibits the Application of Title 20, Part V, Section 752, et seq., and Title 20, Supp. III, Sections 970 to 970(15), Incl., Code of the District of Columbia, 1929 to Petitioner-Association in the Manner Held by the Court Below.

1. The extra-territorial application given these statutes by the Court below to petitioner-association is in direct conflict with the 5th Amendment to the Constitution.

The Court below held that "as the taxes here in question were imposed by Congress, cases holding state taxation invalid as in derogation of the power of Congress are not in point. Various contentions of petitioner with regard to the validity of tax legislation for the District of Columbia are met by *Neild* v. *District of Columbia*, 71 App. D. C. 306, 110 Fed. (2nd) 246." (R. 164.)

Since the expression of the Court below quoted *supra*, appears generally applicable to contentions of petitioner below respecting both the ad valorem property tax and the business privilege tax, it is important to consider the reasoning of the United States Court of Appeals for the District of Columbia in the *Neild* case, *supra*.

That case involved the authority of Congress to impose an excise tax on one transacting business within the District of Columbia based upon gross sales of its property within the District. When challenged as constituting an unlawful burden on interstate commerce under the federal Constitution, the United States Court of Appeals for the District of Columbia took the position that Congress, in enacting the legislation, acted pursuant to Clause 17, Section 8, Article 1 of the Constitution and not in pursuance of its power to regulate commerce under Clause 3 of the same section and article, namely, the constitutional authorization to legislate for the District of Columbia. Parenthetically it stated that the legislation was entirely within con-

stitutional limits if it be regarded as an exercise of the congressional power under Clause 3, the commerce clause. The Court's theory as to the latter was that the commerce clause operates as a limitation solely upon the states and constitutes no bar to the action of Congress in any event. As to the legislation being an exercise of the power to legislate for the District, exclusive to Congress, the Court's theory was that it (Congress) possesses full and unlimited jurisdiction to provide for the general welfare of the citizens within the District by any and every act of legislation which it may deem conducive to that end; that when it legislates for the District, it acts as a legislature of national character exercising complete legislative control as contrasted with the limited power of a state legislature; that it may exercise within the District substantially the powers which the legislature of a state may exercise within the state, but it may also exercise general legislative powers as for example, the power granted by the commerce clause; that when it so acts it is free of the restraints which are imposed by the Constitution upon the states—250, 251 of 110 Fed. (2nd).

It may well be that when Congress exercises general legislative powers within the District, including the power granted by the commerce clause, it is free of the restraints which are imposed upon the states by the Constitution. But this is not to say that when Congress so acts it is unfettered by restraints imposed upon it, by other provisos of the same Constitution, namely, the 1st to the 10th Amendments to the Constitution. That it is subject to such restraints was held in, among other decisions, *Wight* v. *Davidson*, 181 U. S. 371, 384, 80 L. ed. 1402, 21 S. Ct. 960; *O'Donoghue* v. *United States*, 289 U. S. 516, 539, 542, 545-547, 77 L. ed. 1356, 53 S. Ct. 740; *United States* v. *Moreland*, 258 U. S. 433, 66 L. ed. 700, 42 S. Ct. 368, 24 A. L. R. 992; See also: *United States* v. *Mattingly*, 52 App. D. C. 188, 285 Fed. 922, and see footnotes 9 and 10 to reported case of *Neild* v. *District of Columbia*, 71 App. D. C. 306, 110 Fed. (2nd) 246, 250; *Sims* v. *Rives*, 66 App. D. C. 24, 84 Fed.

(2nd) 871, certiorari denied, 298 U. S. 682, 80 L. ed. 1402, 56 S. Ct. 960.

Thus, the Congress, in respect to general legislation or when legislating for the District of Columbia is subject to the restraints, among others, of the 5th Amendment to the Constitution which inhibits the denial of due process and the taking of private property for public use without just compensation. Though the measure of restraint under the 5th Amendment is not as broad as the measure of restraint on the States under the Fourteenth Amendment, nevertheless the restraint is there and an Act of Congress if gross enough, may be sufficiently discriminatory as to be "equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment." *Stewart Machine Co.* v. *Davis*, 301 U. S. 548, 585, 81 L. ed. 1279, 57 S. Ct. 883, 109 A. L. R. 1293; *Heiner* v. *Donnan*, 285 U. S. 314, 326, 76 L. ed. 772, 52 S. Ct. 358, 361; *Coolidge* v. *Long*, 282 U. S. 582, 596, 75 L. ed. 562, 51 S. Ct. 306; *Nichols* v. *Coolidge*, 274 U. S. 531, 542, 71 L. ed. 1184, 47 S. Ct. 710; *Brushaber* v. *Union Pac. R. Co.*, 240 U. S. 1, 24-25, 60 L. ed. 493, 36 S. Ct. 236; *First National Bank of Boston* v. *Comm. of Int. Rev.* (C. C. A.) 63 Fed. (2nd) 685, 692; *Wight* v. *Davidson*, *supra*, pp. 384-387.

While decisions of this Court striking down state taxing statutes as in derogation of the 14th Amendment to the Constitution, or the commerce clause, may not be strictly applicable to the case at bar, it is submitted, that the principles announced in those decisions are generally applicable, except, perhaps, to the extent that those decisions turn on the "equal protection of the laws" clause of the 14th Amendment. Independent of those decisions, however, an Act of Congress may be palpably unconstitutional by virtue of constitutional restraints which do apply to it and the test is frequently the same as that applied to state enactments under the 14th Amendment. "The restraint imposed upon legislation by the due process clauses of the two [5th and 14th] amendments is the same." *Heiner* v. *Donnan, supra*, p. 326.

2. It is not beyond comprehension that constitutional restraints encompass Acts of Congress, when legislating for the District of Columbia, which burden commerce emanating from within-out, of, or without-in to, the District of Columbia.

This proposition, we believe, has never been passed upon directly by this Court, although it was alluded to and passed over in *Stoutenberg* v. *Hennick*, 129 U. S. 141, 148, 32 L. ed. 637, 9 S. Ct. 256, but it was there said at p. 147-148:

> "The act of the Legislative Assembly under which Hennick was convicted * * * was manifestly regarded as a regulation of a purely municipal character, as is perfectly obvious, upon the principle of *noscitur a socias*, if the clause be taken as it should be, in connection with the other clauses and parts of the act. *But it is indistinguishable from that held void* in Robbins v. Shelby Taxing District, 120 U. S. 489, and Asher v. Texas, 128 U. S. 129, *as being a regulation of interstate commerce, so far as applicable to persons soliciting, as Hennick was, the sale of goods on behalf of individuals or firms doing business outside the District.* (Italics supplied)
>
> "* * * The business * * * falls * * * within the domain of the great distinct, substantive power to regulate commerce, the exercise of which cannot be treated as a mere matter of local concern, and committed to those immediately interested in the affairs of a particular locality.
>
> "It is forcibly argued that it is beyond the power of Congress to pass a law of the character in question solely for the District of Columbia, because whenever Congress acts upon the subject, the regulations it establishes must constitute a system applicable to the whole country; but the disposition of this case calls for no expression of opinion upon that point."

Cf. Washington, Alexandria and Mt. Vernon Railway Co. v. *Downey*, 236 U. S. 190, 59 L. ed. 533, 35 S. Ct. 406, dismissing appeal, *Same*, 40 App. D. C. 147.

The question is of such peculiar significance in the case at bar that your amicus curiae feels that it should be passed upon directly by this Court.

If "the power of Congress legislating as a local legislature for the District, to levy taxes for District purposes only, [is limited] in like manner as the legislature of a state may tax the people of a state for state purposes * * *" *Gibbons* v. *District of Columbia*, 116 U. S. 404, 407, 29 L. ed. 680, 6 S. Ct. 427; *Loughborough* v. *Blake*, 5 Wheat. 317, 318, 5 L. ed. 98; *Mattingly* v. *District of Columbia*, 97 U. S. 687, 690, 24 L. ed. 1098, *a fortiori*, when so acting, it is limited by similar constitutional restraints in burdening interstate commerce, as are the states.

3. *Whether the statutes in question be challenged as violative of the 5th Amendment or the commerce clause, their application by the Court below is contrary to the prior decisions of this Court in Stoutenberg* v. *Hennick, 129 U. S. 141, and Cohens* v. *Virginia, 19 U. S. (6 Wheat.) 264, 5 L. ed. 257, and the prior decision of the Court below in Beitzell* v. *District of Columbia, 21 App. D. C. 49.*

If, as the Court below held in *Neild* v. *District of Columbia, supra*, reiterated in its decision in this case (R. 164), Congress, in enacting the act imposing a tax on the privilege of doing business in the District was exercising the power to legislate for the District of Columbia, then the effect of its ruling in the instant case is believed to be contrary to the decisions of this Court in *Cohens* v. *Virginia, supra; Stoutenberg* v. *Hennick, supra,* and contrary likewise to its own decision in *Beitzell* v. *District of Columbia, supra*, in which latter case the rule announced by the Court was held improperly applied by the Court below in *Colgate Palmolive Peet Co.* v. *District of Columbia*, App. D. C., 110 Fed. (2nd) 264, 265.

By applying the rule of the *Neild* case to all of the contentions of the petitioner below in respect to the constitu-

tional validity of these taxing statutes, we submit, that the effect of its ruling as to the ad valorem property tax and the business privilege tax alike is contrary to the above cited decisions.

If the holding of the Court below be not contrary to these decisions then the Acts here brought into question cannot have the extra-territorial effect which the Court gave to them. If the intention of Congress as expressed in these statutes, on the other hand, is that they should have the extra-territorial effect given to them by the Court below, then, it is submitted, both statutes are contrary to the inhibitions of the Constitution as expressed in the 5th Amendment and Article 1, Section 8, Clause 3 of the Constitution.

On the theory that the Congress was legislating locally for the District of Columbia in the enactment of the statutes here in question, the application of those statutes by the Court below is contrary to the pronouncements of this Court in the following, among other decisions, and each of which admittedly involved state statutes and their test of constitutionality under the commerce clause and 14th Amendment of the Constitution, viz., *Alpha Portland Cement Co.* v. *Commonwealth of Massachusetts*, 268 U. S. 203, 69 L. ed. 916, 45 S. Ct. 477; *J. D. Adams Manufacturing Company* v. *Storen*, 304 U. S. 307, 82 L. ed. 1365, 58 S. Ct. 913; *Safe Deposit and Trust Company of Baltimore* v. *Commonwealth of Virginia*, 280 U. S. 83, 74 L. ed. 180, 50 S. Ct. 59; *Union Refrigerator Transit Co.* v. *Commonwealth of Kentucky*, 199 U. S. 194, 50 L. ed. 150, 26 S. Ct. 36; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 30 L. ed. 694, 7 S. Ct. 628; *Stockard* v. *Morgan*, 185 U. S. 27, 46 L. ed. 785, 22 S. Ct. 576; *Asher* v. *Texas*, 128 U. S. 129, 32 L. ed. 368, 9 S. Ct. 1; *State Tax on Foreign Held Bonds*, 82 U. S. (15 Wall.) 300, 21 L. ed. 179.

We do not believe that the restraints imposed upon the state government, in its sphere, or the federal government in its sphere, by the same Constitution, were intended to apply with less rigidity in the latter instance, when Congress is legislating locally for the District, than to the for-

mer when a state legislature is legislating for the state.

The Court below having determined that the revolving fund and the accounts receivable from dealers were the property of petitioner-association and not its farmer-members, then conclude that these items were taxable as the property of petitioner-association, though a foreign corporation, on the basis of its having established a "commercial domicile" in the District of Columbia, and was engaged in business there,—relying on the decision of this Court in *Wheeling Steel Corporation* v. *Fox*, 298 U. S. 193, 208-211, 80 L. ed. 1143, 56 S. Ct. 773, and on its own prior decision in *Hazen* v. *National Rifle Association of America, Inc.*, 69 App. D. C. 339, 101 Fed. (2nd) 432.

In the *Wheeling* case, *supra*, however, no similar questions were presented as were here and which are drawn into question by the Petition for Writ of Certiorari, namely, (1) Is petitioner-association a proprietary corporation engaged, as such, in business in the District of Columbia and has, therefore, a commercial domicile in the District within the purview of Title 20, Part V, Section 752, et seq., Code of the District of Columbia, 1929 and (2) was it the owner of the property sought to be taxed by the District of Columbia under the cited statute?

The Court below so held and it is upon the correctness of that holding that the possible application of *Wheeling Steel Corporation* v. *Fox, supra*, rests.

That the bulk of the securities subjected to taxation and comprising a part of the revolving fund had a physical situs outside the District of Columbia is clear from the record (R. 4, 5, 59, et seq.). Therefore, to hold such securities taxable by the District of Columbia, the Court below, in view of its determination that petitioner-association was the owner of them, applied the rule that intangibles may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business. This it did to answer the contention that petitioner-association in any event was a foreign corporation. *Wheeling Steel Corporation* v. *Fox, supra*, p. 211; *Farmers Loan*

and Trust Co. v. *Minn.*, 280 U. S. 204, 74 L. ed. 371, 50 S. Ct. 98.

It is submitted that there is no basis in the instant case to apply this recognized exception to the rule of *mobilia sequuntur personam*. These securities were not property within the District of Columbia. Hence, they had no legal situs for taxation by District taxing authorities, being owned by non-residents and being located outside the geographical boundaries of the District. *Safe Deposit and Trust Company* v. *Virginia*, 280 U. S. 83, 81, 74 L. ed. 180, 50 S. Ct. 59. Assuming that such intangibles may be properly taxed at the domicile of their owners there "is no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles * * *" *Farmers Loan and Trust Company* v. *Minnesota, supra*, p. 212. The case of *Wheeling Steel Corporation* v. *Fox, supra*, is not in point.

Nor, do we believe the accounts receivable from dealers, had a taxable situs in the District. They constitute debts, as we contend, owing to the farmer-members of petitioner-association and collectible by it as their agent. They did not, as the Board of Tax Appeals found, arise out of, and were necessarily used as an integral part of the business of the Association. (R. 64.) Such indebtedness did not have its origin in the course of business conducted by the corporate entity in the District of Columbia. These obligations of dealers to pay for milk delivered by its members do not represent returns to the corporate entity on any business it conducted in the District of Columbia. We believe the applicable rule is that announced in the decisions of this Court, admittedly later qualified, in *State Tax on Foreign-Held Bonds*, 82 U. S. (15 Wall.) 300, 320, 21 L. ed. 179; as restated in *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 498, 25 L. ed. 558; quoted with approval in *Blodgett* v. *Silberman*, 277 U. S. 1, 15, 72 L. ed. 749, 48 S. Ct. 410, to the effect that "all the property there can be in the nature of things in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be.

Their debts can have no locality separate and apart from the parties to whom they are due." See, also: *Farmers' Loan and Trust Co.* v. *Minnesota, supra*, pp. 212, 213.

For the sake of as much brevity as possible other questions presented by the Petition for Writ of Certiorari, being fully treated therein and in Petitioner's Supporting Brief, are not considered herein by *amicus curiae*.

CONCLUSION.

Your *amicus curiae* is here by sufferance of this Court and the parties to this cause. It submits that the express holdings of the Court below and the implications to which that decision may lead, if permitted to stand, creates many uncertainties as to the legal status of farmers' cooperative associations. As a Federation of such associations, it is vitally interested in preserving the legal concept of agricultural cooperation expressed in the statutes of the United States and the several states. It believes that concept to be endangered by the decision below. And, aside and apart, from that question, here presented, it believes that the application of the taxing statutes involved is repugnant to certain constitutional guarantees and the prior decisions of this Court applying those guarantees to particular statutes and circumstances. Your *amicus curiae* submits that the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia, should be granted.

Respectfully submitted,

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July 17, 1941.